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IN THE

Supreme Court of the United States

October Term, [redacted] 1961

No. ~~800~~ 45

LOU POLLER,

Petitioner

v.

COLUMBIA BROADCASTING SYSTEM, INC., CBS TELEVISION, J. L. VAN VOLKENBURG, and H. K. AKERBERG,

Respondents

PETITION OF LOU POLLER FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

ABRAHAM L. FREEDMAN,
1200 Packard Building,
Philadelphia 2, Penna.,
Counsel for Petitioner.

MAURICE FREEDMAN,
MORRIS WOLF,
WOLF, BLOCK, SCHORR
& SOLIS-COHEN,
Of Counsel.

International, 711 So. 20th St., Phila. 46, Pa.

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Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Lou Poller, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on November 10, 1960.

OPINIONS BELOW.

The opinion of the District Court is reported in 174 F. Supp. 802. It is also printed in the "Joint Appendix"[1] at pages 282-6.

The opinion of the Court of Appeals has not yet been reported. A copy is appended to this petition, as Appendix A (*Infra*, p. 15).

JURISDICTION.

The judgment of the Court of Appeals was entered on November 10, 1960. The jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646(1), 62 Stat. 928(1), 28 U. S. C. § 1254(1).

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1. A Joint Appendix was filed in the court below. A certified copy of this appendix and 9 additional copies thereof, have been filed with this petition in accordance with Rule 21 of this Court. All references to the Joint Appendix are designated "JA".

QUESTIONS PRESENTED.

1. Where a national TV network purchased the UHF station of its affiliate's competitor and then cancelled the affiliation and bought the affiliate's equipment, so that the network became the sole owner and operator of UHF in the area and excluded all other entrants into UHF in the area, is it proper to ignore all the evidence of its monopoly, attempted monopolization and conspiracy, on the ground that the network had the contractual "right" to cancel the affiliation and the inherent "right" to purchase a station and therefore the admitted injury to petitioner was *damnum absque injuria*?

2. Is contributory negligence a defense to the Sherman Act; i.e., should the victim be denied redress because he had prospered and expanded his station with knowledge that the monopolist exercising its contract "right" might cancel the affiliation and eliminate him?

3. Is a network's vertical integration by entry into the station operation business equivalent to the benign selection by a trader of the customer with whom he will deal?

4. Can an unincorporated subsidiary be a party to a conspiracy in restraint of trade, where it operates precisely like an incorporated subsidiary?

5. May summary judgment be granted against a plaintiff despite genuine issues of fact, because the court chooses to accept the evidence of the defendant and ignore the testimony in contradiction of it?

STATUTES INVOLVED.

The statutory provisions involved are Sections 1, 2 and 7 of the Sherman Act, Act of July 2, 1890, c. 647, §§ 1, 2 and 7, 26 Stat. 209, 15 U. S. C. §§ 1, 2 and 7; and Section 4 of the Clayton Act, Act of October 15, 1914, c. 323, § 4, 38 Stat. 731, 15 U. S. C. § 15. They are printed in Appendix B (*Infra*, p. 35).

STATEMENT OF THE CASE.

This is a treble damage suit charging violations of Sections 1 and 2 of the Sherman Act.

Petitioner is the assignee of Midwest Broadcasting Company ("Midwest"), a corporation which owned and until February 27, 1955 operated a UHF (ultra high frequency) television broadcasting station (WCAN-TV) in Milwaukee, Wisconsin (JA 6, 235).

After a long freeze on the issuance of licenses for new stations, the Federal Communications Commission (FCC) in June 1952 made additional channels in the UHF band available for television. Midwest then obtained a permit for a UHF station in Milwaukee and on August 12, 1953 signed an affiliation agreement with CBS-TV for two years. CBS-TV reserved the unilateral right to terminate the affiliation at any time on six months' notice (JA 15, 235-9).

In December 1953 the FCC gave notice of a proposed rule that would permit the ownership by a single licensee of 7 television stations of which not more than 5 could be VHF (very high frequency) stations.

At this time there were, in addition to petitioner's station, two other television stations in the Milwaukee market. One was a VHF station, affiliated with NBC and ABC. The other, WOKY-TV, owned by Bartell Broadcasters, Inc., was a UHF station with no primary affiliation (JA 16, 235).

By this time petitioner's station, WCAN-TV, was operating profitably, and was praised by CBS-TV as an outstanding example in the country of a successful UHF operation (JA 15, 241).

As a result of his success petitioner had embarked on a considerable expansion program of which he kept CBS fully informed. He acquired new and improved equipment for his station and was building a new studio (JA 18, 242). Storer Broadcasting Co. had manifested an interest in acquiring

petitioner's station for $2,000,000 if the proposed FCC rule was adopted, and petitioner had indicated his willingness to sell (JA 17, 239).

In July 1954 the CBS respondents, in anticipation of the new FCC rule, determined to acquire for themselves an option to buy a UHF station in Milwaukee (JA 19, 32). They therefore engaged the services of defendant Thad Holt (JA 19, 50). On July 26, 1954 Holt met with CBS representatives in New York, and from there went directly to Milwaukee (JA 91). Three days later, without disclosing CBS' interest in the transaction, Holt secured from Bartell an option in his own name to purchase station WOKY-TV (JA 91). Neither Holt nor CBS ever approached petitioner regarding the purchase of his station, although CBS knew of petitioner's discussions with Storer and had tried to dampen Storer's interest in petitioner's station by refusing to give assurance that the CBS affiliation would be continued (JA 26, 163-5, 178-9).

On September 17, 1954, the FCC adopted its proposed rule, effective October 22, 1954. Late on October 21, 1954, a few hours before the rule become effective, CBS-TV telegraphed petitioner that his affiliation was cancelled (JA 20).

Petitioner immediately flew to New York and pleaded with the officials of CBS for an explanation and reconsideration of their cancellation of his affiliation (JA 50, 223-4). As a result of this meeting an agreement was entered into whereby CBS-TV acquired the physical assets of petitioner's station and an assignment of his studio leases and transmitter site, in exchange for $500,000 and the physical equipment CBS was acquiring from Bartell. The agreement contained a statement that petitioner would continue to operate a television station in Milwaukee (JA 51, 61). This was made a condition of the deal by CBS although both parties realized Poller could not continue operations and the statement was nothing more than "window dressing" (JA 105-6).

On October 25, 1954 Holt assigned his option to CBS and CBS immediately exercised it (JA 20, 92).[2]

On February 17, 1955 CBS-TV commenced operation in Milwaukee under the call letters WXIX-TV; and on February 27, plaintiff ceased broadcasting. CBS-TV, the producer of national TV programs, thereupon became the sole UHF station owner and operator in the Milwaukee area (JA 21-2).

In September, 1956, petitioner brought the present action on the ground that the events in Milwaukee constituted a conspiracy to eliminate the only two UHF stations in Milwaukee, petitioner's and Bartell's, and at the same time to coerce petitioner to sell to CBS-TV at a distress price through cancellation of the CBS affiliation, with the result that CBS would become the sole UHF telecaster in the Milwaukee market. Petitioner further claimed that respondents' conduct constituted monopolization and an attempt to monopolize. Petitioner claimed damages for the loss of his station.[3]

The District Court, Holtzoff, J., granted summary judgment against petitioner on the ground that assuming that the Sherman Act had been violated and a conspiracy had been shown, nevertheless, petitioner's admitted injuries were *damnum absque injuria* because CBS had simply exercised a contractual right to cancel petitioner's affiliation and a legal right to choose to buy a station, albeit a rival station which CBS-TV now would operate as a self-affiliate (JA 282).

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2. The FCC approved the acquisition of station WOKY-TV by CBS by the narrow division of three to two, with a strong dissent by Commissioners Hennock and Bartley that this transfer would not serve the "public interest, convenience and necessity." 11 *Pike and Fischer, Radio Regulation* 913. One of the affirming Commissioners was Lee to whom Dr. Stanton had previously spoken, *ex parte*, concerning CBS' acquisition of a UHF station in Milwaukee (JA 173-6).

3. Damages are claimed in the amount of $1,450,000 and the trebled amount of $4,350,000. This represents the difference between the actual value of petitioner's equipment and facilities (at least $2,000,000) and the amount at which CBS-TV acquired it ($500,000 in cash and used equipment of WOKY-TV worth no more than $50,000).

The Court of Appeals (Judges Prettyman and Washington) heard argument on February 5, 1960, and on its own motion, reargument on May 23, 1960 before Wilbur K. Miller, C. J., Prettyman and Washington, JJ. On November 10, 1960, the Court of Appeals affirmed the judgment of the District Court in an opinion by Chief Judge Miller. A vigorous dissent was filed by Judge Washington.

REASONS FOR GRANTING THE WRIT.

1. The Court below has created new law which would make profound changes in the antitrust laws.

(a) It has made contributory negligence a defense. The majority opinion declares that assuming a conspiracy and a restraint of trade, no cause of action exists because Poller "recklessly proceeded" to expand his successful station and hence the admitted injury to him was not the result of a violation of Section 1 (*Infra*, p. 22).

The same theory is used for holding that there was no violation of Section 2. The majority opinion states that assuming CBS became a monopolist in Milwaukee by acquiring Poller's and Bartell's stations, nevertheless, Poller was not thereby injured in his business or property because such injury "was caused by his improvidence" in expanding his station (*Infra*, p. 25).

Whether Poller expanded less or more, is a matter of damages which cannot affect the question of causation, i.e., whether he was injured by the violation of the Sherman Act.

(b) The court below also created a doctrine of estoppel by contract as a defense under the Sherman Act. Any violation of Section 1 was held excused because Poller accepted CBS' affiliation contract with a six months' cancellation provision. The court below therefore treated all the injury that flowed from the cancellation as legally without remedy because it was authorized by a contract provision.

As to Section 2, the court applied the same principle. It added that CBS was also excused because Poller agreed, when he was forced to turn his equipment over to CBS-TV, that he would continue to operate. This provision in the contract was required by CBS (JA 159, 222). It served no purpose of Poller's, but he had no bargaining power with CBS and had to acquiesce. The provision obviously was inserted out of fear of the Sherman Act, for it had no relevance to the contract of purchase of equipment. The court below has now exalted this self-serving provision to a complete defense against the charge of monopolization.

Whatever the monopolist may coerce by way of agreement from its victim cannot constitute a defense when the monopolist is brought to account for the injury done.

2. The court below extended *United States v. Colgate & Co.*, 250 U. S. 300 (1919), in direct conflict with decisions of this Court. The court below held that what otherwise would have been a restraint of trade or monopolization was excused because CBS exercised its "rights". It held that CBS had the inherent "right" to buy Bartell's station instead of Poller's and had the contractual "right" to cancel Poller's affiliation. Ignoring the obvious effect of these acts *in combination*, it concluded that CBS did not restrain or monopolize trade because it merely exercised as to Bartell the long-recognized right of a manufacturer or trader to choose the customer with whom he will deal, and as to Poller exercised the "right" granted by its contract to terminate its affiliation (*Infra*, p. 21).

The limits of the ever-recurring argument that a manufacturer or trader has the right to select his customer (*United States v. Colgate, supra*), was recently reviewed in *United States v. Parke, Davis & Co.*, 362 U. S. 29 (1960). Whatever may be the fullest reaches of *Colgate* as explained in *Parke, Davis*, it does not even apply where a national network uses its leverage power as a network to enter into the business of operating a local TV station and thereby reduce

competition and create monopoly. *Eastman Kodak v. Southern Photo Materials Co.*, 273 U. S. 359 (1927); *United States v. Griffith*, 334 U. S. 100 (1948); *Schine Chain Theaters v. United States*, 334 U. S. 110 (1948); *United States v. Columbia Steel Co.*, 334 U. S. 495 (1948).[4] A situation closely parallel to that which confronted Poller was before this Court in *United States v. Radio Corporation of America*, 358 U. S. 334 (1959), where the complaint was predicated upon such coercive use of network power and this Court reversed a summary judgment dismissing the complaint and remanded the case for further proceedings.

By thus extending *Colgate*, the court below held that leverage power in one field used for monopoly in another field is a simple case of customer selection.

Here, unlike *Packard Motor Car Company v. Webster Motor Car Company*, 243 F. 2d 418 (D. C. Cir. 1957), on which the court below relied, a network invaded the retail field and made petitioner's property worthless to everyone but the network. There the termination of affiliation was held to be a simple exercise of a contract right only after a full examination of all the surrounding circumstances to ascertain the power position of the manufacturer and the economic effect of its action in the market. Here the court below exalted the contract right to a level that reduced the surrounding circumstances to immateriality. It has, therefore, further extended its already controversial holding in *Packard*.

The court below excluded as irrelevant the important economic facts which are the basic concern of the Sherman Act. The economic fact is that CBS eliminated Poller the moment it bought Bartell. By reaching into the "retail" field of local station broadcasting in Milwaukee, CBS removed all network affiliation possibilities for everyone in the Milwaukee area. For the realistic fact is that the removal of CBS affiliation was the same as the removal of all

4. Similarly, *United States v. General Motors*, 121 F. 2d 376 (C. A. 7, 1941).

affiliation possibilities, since the other two networks were already affiliated with preferred VHF stations. CBS itself monopolized UHF in Milwaukee and became the sole operator. Thus, where previously there had been two UHF stations, now there was but one. Where there had been two independently operated UHF stations, now there was none. No one else could come into Milwaukee with UHF. The field was now closed and CBS was in exclusive control.

All these significant facts of monopoly and restraint of trade, which appear in Judge Washington's dissent, are notably absent from the majority opinion. For on its view of the law, they were irrelevant.

3. The court below held that a wholly-owned unincorporated subsidiary of a giant corporation is incapable of being a party to a conspiracy under the Sherman Act. It held this even though the subsidiary, CBS-TV, was established to operate in a well-defined economic area and functions as a corporation.[5] The dissenting opinion by Judge Washington flatly opposes this view (*Infra*, p. 28).

This is a new question, never before specifically decided by this Court. It is of ever-growing significance in the administration of the antitrust laws. For it is obvious, as appears in the present case, that since the decision in

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5. The unincorporated subsidiaries are called "divisions". Each division has its own officers (JA 149, 192); the officers of both unincorporated "divisions" and incorporated "companies" are equally subject to the direction of the Board of Directors (JA 193); subsidiary corporations have been changed into divisions and *vice versa* (JA 193); each division maintains a separate bank account, a separate table of organization, and separate accounts for payroll and accounting purposes (JA 149, 195). CBS admitted that other than the difference in corporate form there are no differences between CBS divisions and subsidiary corporations (JA 195).

Indeed, the independence of CBS-TV has been recognized to the extent that CBS has permitted it to enter into contracts with corporate subsidiaries and others, and even with other unincorporated divisions in its own name and on its own behalf (JA 45, 149).

Obviously, if the unincorporated division can contract, it can agree, and if it can agree, it can conspire.

Timken Roller Bearing Co. v. United States, 341 U. S. 593 (1951), some corporations have sought to avoid liability for conspiracy by unincorporating their subsidiaries.[6]

4. The limits of summary judgment procedure have been so seriously ignored, that this Court in the exercise of its supervisory power should forbid such encroachments on the right of trial by jury. Repeatedly, the court below accepts CBS' explanations of the facts. A striking instance of this is the statement that CBS "chose" not to attempt to buy Poller's station because it considered the $2,000,000 price too high (*Infra*, p. 17). This went to the decisive question why CBS, knowing that Poller's station was for sale, did not approach him, but instead bought Bartell's station and then took over Poller's equipment, thereby in the combined acts eliminating both Poller and Bartell. To justify this CBS claimed that its policy was never to buy a station from an affiliate except at the price the affiliate first asked. CBS then explained this extraordinary policy on the ground that it feared that otherwise people would be "claiming that we were improperly using our affiliation to grind down an individual and an individual's price". It could grind down an individual's price, if it wanted to, according to its vice president, "by telling a guy that if he didn't come down in price we'd go across the street and take the affiliation away from him, go across the street and buy" (JA 200). Clearly, CBS' explanation is alone sufficient to submit to the jury the issue whether it did not buy or even negotiate for Poller's station because it wanted to go across the street and grind down his price by transferring its af-

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6. CBS' President, Dr. Stanton, fixed the date of the divisional set-up in June of 1951 (JA 144); its Vice President, Mr. Salant, also referred to establishment of the "divisional" concept "in 1951 or shortly thereafter" (JA 194). Memoranda implementing the procedure on appointment and authorization of division executives are dated August 8, 1951 (JA 230-4). *Timken* was handed down June 4, 1951.

filiation. The majority accepts CBS' explanation without even mentioning the evidence which destroys it.

Similarly, the majority opinion refers to Poller's statement that he would continue broadcasting in Milwaukee even after he had abandoned his expensive equipment to CBS-TV. It states this as a fact, without even referring to the contrary evidence, such as the inadequacy of the Bartell equipment, the reasons for the statement that he would continue in business, or the obvious fact that he could not survive without an affiliation, now in competition with CBS-TV as a local operator, instead of Bartell.

The majority opinion is completely silent on the function of a court in summary judgment cases. It is only in Judge Washington's dissenting opinion that some of the contrary facts are set out and recognition is given to the test which should apply in viewing the evidence on such a motion. And as Judge Washington said, the general rule "would seem particularly true where (as here) it is charged that the public has been deprived of maximum television service by a reduction of competition . . . ." (*Infra*, p. 32).

5. Television is the newest and probably the most important medium of mass communication. Its enormous public influence was emphasized in the recent Presidential election. It is an industry which admittedly is "bursting at the seams" because of the limited number of VHF channels (JA 204). The only means of expanding television channels is in the wider spectrum of UHF. UHF was the great hope for independent television broadcasting in the United States. Poller was admittedly in the forefront of the energetic young broadcasters who had hoped to make UHF successful (JA 204, 241). At the height of his success he was struck down by CBS, whose affiliate he was. In Milwaukee the UHF field was cleared of independents and preempted by CBS. As Judge Washington said in his dissenting opinion:

> "... by waiting for Poller and Bartell to develop the UHF market in Milwaukee and then using its economic and contractual power to establish itself in Milwaukee in their stead, CBS must have seriously discouraged new UHF operations elsewhere, for few entrepreneurs would be willing to pioneer a new field only to have the fruits of success taken from them by a network, without compensation." (*Infra*, p. 31)

All of this was made possible by the power CBS had acquired by practices in the television industry which until now have gone unchecked. Today the television industry is in a stage which closely resembles the motion picture industry before *United States v. Paramount*, 334 U. S. 131 (1948). Practices long since condemned in the motion picture industry, such as "block booking" and "clearances", are still prevalent in television in the form of "option time" and "must buy".[7] The three giant television networks which create programs and advertising have been permitted also to own and operate stations, something which this Court condemned in the *Paramount* case. The extreme concentration of control in the three networks with its opportunities for coercion should alone be enough to hold illegal under the Sherman Act their further expansion into the station operation business. The enunciation of such a

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7. Since this action was begun significant developments have occurred which would warrant a change to the past tense in the treatment of "must buy". On November 27, 1958, CBS announced to its affiliates that effective March 1, 1959, it would no longer pursue the "must buy" policy, but instead would require a "minimum buy" by which network advertisers would be obliged to contract for a minimum amount of dollars of advertising if they desired to have any network advertising at all (JA 245-246). On January 7, 1959, NBC also announced abandonment of its "must buy" policy effective March 15, 1959 and the institution of a "minimum buy" plan (JA 246). ABC has enforced a "minimum buy" for some time.

However, since the practice was still in effect as of the times pertinent to this case, the present tense has been retained.

principle is required by the circumstances of the present case. For it is by cancelling Poller's affiliation and buying Bartell's station and Poller's equipment that CBS was able to monopolize UHF in Milwaukee.

CONCLUSION.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ABRAHAM L. FREEDMAN,
Counsel for Petitioner.

Feb. ary 1, 1961.

APPENDIX A.

OPINION OF THE COURT.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 15,379

LOU POLLER, APPELLANT

v.

COLUMBIA BROADCASTING SYSTEM, INC., ET AL., APPELLEES

Appeal from the United States District Court for the District of Columbia

Decided November 10, 1960

Mr. Abraham L. Freedman, of the bar of the Supreme Court of Pennsylvania, *pro hac vice*, by special leave of court, with whom *Mr. George R. Benesman* was on the brief, for appellant. *Mr. Wm. Montgomery Smith* also entered an appearance for appellant.

Mr. Samuel I. Rosenman, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Mr. Leon R. Brooks* was on the brief, for appellees.

Before WILBUR K. MILLER, Chief Judge, and PRETTYMAN and WASHINGTON, Circuit Judges.

WILBUR K. MILLER, *Chief Judge:* This is a civil suit for threefold damages under Section 4 of the Clayton Act brought by appellant, Lou Poller, against the appellee, Columbia Broadcasting System, and others. He charged them with combining and conspiring to restrain trade and commerce in the television industry in violation of Section 1 of the Sherman Act, and with monopolizing and attempting to monopolize trade and commerce in that industry in violation of Section 2 of the Sherman Act, and alleged he had thereby been injured in his business and property.

Poller sued as assignee of Midwest Broadcasting Company, a dissolved corporation of which he had been president and in which he had been the dominant figure. Midwest had been the owner and operator of a UHF television broadcast station in Milwaukee from time of construction in 1953 until February 27, 1955. Poller claimed CBS, in violation of the antitrust laws, had conspired with others to acquire his station at a price below its actual value. He stated the basis of his suit as being that the alleged conspirators frustrated the efforts of others to acquire his station, secretly obtained an option on a competing station, and then cancelled the affiliation agreement CBS had had with Midwest. As a result of what he calls "this three-pronged manouver," Poller says the conspirators purchased his equipment from him at a price far less than its real value, although he admits the purchase was "on plaintiff's entreaty."

More specifically, the facts are these: Under a construction permit granted February 4, 1953, Midwest Broadcasting Company began the construction of a UHF television broadcast station in Milwaukee, where there was already a VHF station affiliated with NBC. On August 21, 1953, as its station neared completion, Midwest made an

affiliation agreement with CBS, subject to the latter's unilateral right to cancel at any time on six months' notice.[1] A short time later Bartell Broadcasters began operating another UHF station—WOKY—in Milwaukee. The Bartell station was neither as elaborate nor as successful as Midwest's.

In January, 1954, Midwest was informed by a broker that, if and when the Federal Communications Commission adopted a multiple ownership rule which would permit George B. Storer to add a UHF station to the others owned by him, Storer would pay $2,000,000 for Midwest's station. About that time the latter began adding substantial improvements to its facilities.

CBS says it had faith in UHF, although general opinion in the industry was that it could not successfully compete with VHF. It therefore determined, later in 1954, to acquire a UHF station in Milwaukee, if and when the Commission should adopt the "5 and 2" rule,[2] which would permit it to do so. CBS had learned of Poller's efforts to sell the Midwest station for approximately $2,000,000 —a price it considered to be substantially more than the property was worth, and "completely out of line." Because of this, CBS chose not "to enter into any kind of trading" with Poller, but decided to attempt to acquire the other UHF station in Milwaukee. To that end, it employed one Thad Holt, an independent consultant, to obtain from Bartell as assignable option to purchase station WOKY. On July 29, 1954, Holt obtained such an option in his own name, without disclosing the identity of his principal. The option price was $335,000, which Holt said was arrived at by adding $50,000 to Bartell's investment. This option, which endured until October 1, 1954, was extended

1. Poller "continuously" pleaded with CBS to eliminate the provision for cancellation on six months' notice, but CBS refused. Poller said he used the CBS insignia "with trepidation," because of the tenuous nature of the network affiliation.

2. An amendment to the multiple ownership rule permitting one person to own five VHF and two UHF television stations.

to February 1, 1955. On September 17, 1954, the Commission adopted the 5 and 2 rule, effective October 22. On October 25, 1954, Holt assigned the option to CBS, which immediately exercised it.

Meantime, on October 21, CBS notified Midwest that its affiliation agreement would be cancelled as of April 22, 1955. The day after the notice of cancellation was given, Poller flew to New York and pleaded with officials of CBS to reconsider the termination of his company's affiliation, stating he had gone to great expense for a new studio and equipment, far more elaborate than that he would have required for a station which did not have a CBS affiliation. He stated he intended to continue television broadcasting in Milwaukee but he would not require for that purpose the expensive equipment he had contracted to purchase.

It was suggested that CBS might protect Midwest against the loss Poller feared by purchasing the physical equipment for which it had contracted and by taking over its studio lease. CBS agreed. It took over the studio and equipment, transferred to Midwest the equipment it had bought from Bartell, and paid Midwest the sum of $500,000. Midwest acknowledged that CBS had assumed liability for the work in progress and had paid it in full for the sums it had spent. Midwest also agreed to operate its station with the equipment formerly owned by Bartell, but failed to do so.

On February 17, 1955, CBS began operating its UHF station in Milwaukee, having paid Midwest $1,000 a day for advancing the cancellation date from April 22, 1955; but on March 21, 1959, the station was closed because its operation was marginal or unprofitable.[3] Midwest ceased broadcasting February 27, 1955, and in December, 1955, its cor-

3. When CBS acquired its Milwaukee station, there were two VHF stations in that market and a third went on the air thereafter. The result was that CBS was operating the only UHF station in the nation which was in competition with three VHF stations in the same market.

porate existence was terminated and all its assets were transferred to Lou Poller, who had been its president and sole stockholder.

In September, 1956, Poller filed this suit in the United States District Court against Columbia Broadcasting System, CBS-TV, an unincorporated division of CBS, J. L. Van Volkenburg and H. K. Akerburg, respectively president and vice president of CBS-TV, Bartell Broadcasters, and Thad Holt. As we have said, he charged them with conspiring to acquire the Midwest station in violation of the antitrust laws and at a price below its actual value, and charged CBS with monopolization and an attempt to monopolize.

Poller prayed for damages which he computed as follows: he sold the Midwest property, which he says was worth $2,000,000, to CBS for $500,000 and the transfer of the Bartell equipment, which he says was worth no more than $50,000; therefore he claimed damages of $1,450,000, trebled in accordance with the statute.

After extensive filings of interrogatories, depositions and affidavits, the District Court on June 9, 1959, entered an order granting the defendants' motion for summary judgment and dismissing the complaint as to CBS, Van Volkenburg and Akerberg. The opinion of the District Court is reported at 174 F. Supp. 802 (1959). Poller appeals.

The first question is—assuming without deciding that Midwest received less than the fair value of its station—whether Midwest was forced to sell by anything CBS did. Poller admits that the large value he placed on the Midwest station—greatly in excess of its cost—depended upon a CBS affiliation not subject to cancellation on six months' notice. Midwest did not have such an affiliation, and from the beginning CBS had refused to grant it. Poller realized from the outset the shakiness of his position and used the CBS insignia "with trepidation." His sale to CBS was not sought by the latter. On the contrary, CBS bought

Poller's equipment only at his importunity and to save him from the loss he thought he was about to suffer because he had improvidently contracted for construction of elaborate facilities which he would need only if he had the firm affiliation CBS had consistently refused to give him.

We are of the opinion that Poller's entreaty to CBS to buy his equipment was brought about by his own act of investing too heavily in the UHF equipment without having a firm network affiliation. Certainly he sought the sale and entered into it voluntarily.

If it be assumed, however, that Poller was forced to sacrifice his station by the acts of the alleged conspirators, other questions remain. Was there a conspiracy? If so, did the acts of the conspirators restrain trade or commerce in the television industry?

We turn to a consideration of the first of these questions: Did CBS and the individual appellees enter into a conspiracy in restraint of trade or commerce among the several States? The purpose of Section 1 is to prohibit joint action of two or more persons in combining their economic power and restricting competition. Poller's charge that CBS conspired with one of its unincorporated divisions and two of its employees is obviously unsound. It is in reality a charge that CBS conspired with itself. As the Fifth Circuit said in *Nelson Radio & Supply Co. v. Motorola:*[4]

> ". . . It is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation. . . . [A] corporation and its subsidiaries can be guilty of a conspiracy in restraint of trade but that involves separate corporate entities. . . ."

4. 200 F. (2d) 911, 914 (1952), *cert. denied* 345 U. S. 925 (1953).

We conclude that CBS, its unincorporated division, and its employees were incapable of conspiring to restrain trade or commerce. The question becomes, then, whether CBS conspired with Bartell Broadcasters or Thad Holt to accomplish that purpose. Bartell and Holt are not now parties: the complaint was dismissed by the court as to the former upon its suggestion of improper venue, and the latter was never served with process.

The record shows Bartell gave an option to Holt without knowing he was acting for CBS, and did nothing more than sell its station as it was required to do by the option. Holt knew nothing of Poller or his station, and merely acted as agent for CBS in obtaining the Bartell option. In short, the record shows Bartell and Holt did not enter into a concerted scheme with CBS, but that the latter alone conceived and consummated the plan of acquiring the UHF station in Milwaukee which had been competing with Midwest.

Even if it be thought that Bartell and Holt combined with CBS to accomplish a common purpose, it does not seem to us that the purpose was to restrain trade or commerce. Poller complains that CBS cancelled Midwest's affiliation. It had the contractual right to do that. He complains that CBS chose to buy the Bartell station instead of his own. Certainly CBS did not act illegally in making that choice; it was under no sort of obligation to buy the Midwest station.

Then, when CBS saved him from the loss he might have suffered had he been left with the expensive facilities he had bought to meet a network affiliation he did not have, Poller complains he was forced by CBS to make a sacrificial sale. But his real complaint is that CBS would not eliminate the six months' cancellation clause from his affiliation agreement. He had never been led to believe this would be done; on the contrary, CBS had consistently refused to do it. Nevertheless, despite his "trepidation,"

Poller recklessly proceeded to incur large liability for expanded facilities he knew he would not need without the affiliation which had been continuously denied him.

It was said in *United States v. Colgate & Co.*, 250 U. S. 300, 307 (1919):

> ". . . In the absence of any purpose to create or maintain a monopoly, the [Sherman] act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. . . ."

The Supreme Court has not departed from this rule, which has since been applied to broadcasting networks. In *Federal Broadcasting System v. American Broadcasting Co.*, 167 F. (2d) 349, 351, *cert. denied* 335 U. S. 821 (1948), the Second Circuit said:

> ". . . The principal ground urged in support of the charge of a boycott as a basis for the temporary injunction is that by concerted action the American and Mutual networks have cancelled their existing arrangements with the plaintiff. However, each did this pursuant to the terms of its agreement, and it is clear that if these defendants really acted individually and not jointly they were within their rights. A network is not a common carrier and each therefore had the right in the absence of concerted action to make such contracts for the distribution of its programs as it chose. . . ."

We conclude from the foregoing that the acts done by CBS and its co-defendants did not restrain trade or commerce. Hence, any injury to Poller's business and property caused by those acts was not the result of a violation of Section 1 of the Sherman Act.

The next question is whether CBS monopolized any part of the trade or commerce among the several States.[5]

As we have seen, CBS cancelled its affiliation with Midwest, bought the Bartell UHF station, later traded the Bartell equipment for that of Midwest, and also paid a large cash consideration, and then attempted to operate a UHF station in Milwaukee but failed and closed the station. These acts do not manifest an attempt to monopolize any part of the trade or commerce in the television industry. There was no attempt to monopolize UHF in Milwaukee, for Poller expressly said he would continue to operate there with the less elaborate Bartell equipment which would be sufficient for operation without a CBS affiliation. He accepted the Bartell equipment for that purpose. The failure of UHF in Milwaukee seems to have been due to the superiority of VHF competition.

Poller argues that each of the three national television networks—American Broadcasting Company, CBS and National Broadcasting Company—has a "vertical" monopoly, despite the fact they are fiercely competitive.[6]

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5. It has already been shown that CBS did not combine or conspire with any person or persons to do the acts which are the basis of Poller's complaint. Hence it did not "combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States." So, the question is limited, as stated in the text above, to the question whether CBS itself monopolized any part of the trade or commerce among the several States, or attempted to do so.

6. This notion is thus expressed in Poller's brief:

"It is a vital fact that because of physical limitations a particular station can broadcast only one program at a time, and because programs can only be received on a particular set one at a time there is an automatic exclusion by each program of all others at that time.

"Accordingly, the broadcast of a network program results in a vertical monopolization of every station throughout the country which receives and transmits that program at the time it is broadcast. The case is no different than it would be if because of physical law three concerns doing the same thing could reach into only one of three separate areas of space. In a sense,

The appellant says that, because a particular station can broadcast only one program at a time and only one program at a time can be heard on a receiving set, the broadcast of a network program results in vertical monopolization of every television station in the nation which receives and transmits it. This is the result of physical laws, and cannot be said to be monopolization by CBS or either of the other two networks.

Appellant goes on to argue that "In the great majority of markets where there are more than two stations each network requires that the station which takes its programs must become in effect its exclusive station"; that "The network does even more; it ties the stations to affiliation agreements which give the network exclusive control, yet keeps them dangling by the provision under which it can at will terminate the franchise upon which their financial fate depends."

Poller asserts that the power of CBS to own and operate television stations is "a potent monopolistic weapon."

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they would be competing with each other. But it is equally true that each of them would have an exclusive monopoly in the *entire* area that it could *possibly* embrace. It is no less a monopolization by any one merely because there is another outside area unapproachable by it, in which others likewise hold exclusive sway.

* * * *

"In the great majority of markets where there are more than two stations each network requires that the station which takes its programs must become in effect its exclusive station. Thus, by the coercive power of its programming the network has accumulated what it calls a chain of affiliated stations. These affiliates are no part of the network's investment of money or management. Others have made the investment; others have the burden of management; others run the risk of loss. But by virtue of the network having the program to sell, it requires by contract that these stations become in effect its subsidiaries. Thus, by an ironic perversion of the circumstances, the supplier dominates the customer. The network does even more; it ties the stations to affiliation agreements which give the network exclusive control, yet keeps them dangling by the provision under which it can at will terminate the franchise upon which their financial fate depends."

He characterizes it as an "element in the chain of monopoly practice." This power, he says, is "a potential threat against every station in the country." He expresses the belief "that, notwithstanding commission sanction,[7] the ownership of stations by networks effects such a concentration of control in the television industry as is violative of the antitrust laws."

Whether appellant's assertions are valid is not before us. Nor are we called on to review the 5-2 regulation. Rather, the question is whether, by the exercise of the right to acquire the Bartell station and the Poller equipment, CBS monopolized or attempted to monopolize interstate trade or commerce in the television industry; and, if so, whether Poller is thereby injured in his business or property. We perceive no monopoly or attempt to monopolize but, instead, an unsuccessful attempt to compete with other Milwaukee stations. For, after the Bartell acquisition, CBS had competition in Milwaukee from both VHF and UHF stations, and after acquiring Poller's equipment its station continued to have VHF competition to which it finally yielded. Of course, the competitive situation among the networks continued as before.

Assuming, however, (without deciding) that by either acquisition CBS was monopolizing or attempting to monopolize, we are of the opinion, for reasons stated elsewhere in this opinion, that Poller was not thereby injured in his business or property. Such injury as he may have sustained, we repeat, was caused by his improvidence in

7. The Commission sanction to which Poller refers is the 5-2 regulation of the Federal Communications Commission permitting one concern to own as many as, but not more than, five VHF and two UHF stations. The Commission has thereby held in effect that a network's ownership of that small number of stations is not against the public interest. As monopolization or an attempt to monopolize any part of trade or commerce among the several States is contrary to the public interest, the effect of the expert Commission's regulation is that such limited multiple ownership of facilities in the field it regulates does not violate Section 2 of the Sherman Act. Much weight should be given, we think, to the Commission's holding.

contracting for elaborate equipment to meet the requirements of a firm affiliation he knew he did not have.

Such is the monopolization with which CBS is charged. The essence of it is that the network keeps the stations "dangling" because of the provision it can cancel the franchise at will. That is to say, CBS is charged with monopolizing or attempting to monopolize some part of trade or commerce in the television industry because it kept Midwest "dangling" by retaining the right to terminate its affiliation on six months' notice. The retention of the right to cancel was lawful, and Midwest agreed to it.

All affiliation agreements between networks and stations are for fixed and limited terms, just as are station licenses granted by the Federal Communications Commission, but Poller does not claim this produced monopoly, even though the network is under no obligation to renew. It is the right of cancellation retained by CBS which he says kept his station "dangling." Although he was unhappy about it, Poller knowingly accepted affiliation subject to cancellation on six months' notice, as he could do no better. We see no reason for him to complain that the option to cancel was exercised.

Whether or not *Packard Motor Car Co. v. Webster Motor Car Co.*, 100 U. S. App. D. C. 161, 243 F. (2d) 418 (1957), is dispositive here, as the District Court held, that case is certainly relevant and indicative of the applicable doctrine. Several dealers in Baltimore had one-year contracts with Packard to sell its cars in that area. One of them informed Packard he would not continue as dealer unless he were granted an exclusive agency. Packard agreed, and refused to renew the franchises of the other dealers. One of them sued Packard for triple damages, alleging the transaction constituted a conspiracy in restraint of trade in violation of the Sherman Act. We held there was no contract or conspiracy to restrain trade within the meaning of the Sherman Act.

We have noted appellant's argument that the national networks have coercive and restrictive practices which extend the monopoly he asserts they have. These practices are: (1) the "must buy" policy which requires advertisers to buy time on a designated group of stations; (2) the "option time" practice under which affiliates contract to accept and broadcast all network programs offered to them during designated hours of the broadcast day.

We need express no opinion regarding these practices because it does not appear that either played any part in causing the injury to the business and property of Poller, of which he complains.

In sum, we hold the record shows there was no illegal conspiracy to restrain trade or commerce among the several States, that no restraint of such trade or commerce appears, and that no monopoly or attempt at monopoly was shown.

Affirmed.

WASHINGTON, *Circuit Judge, dissenting:* Poller's suit charges a conspiracy in restraint of trade in violation of Section 1 of the Sherman Act and a monopoly, attempted monopoly, or conspiracy to monopolize trade in violation of Section 2 of that Act. The District Court, without deciding whether the Sherman Act had been violated, gave summary judgment against Poller on the ground that his admitted injuries were *damnum absque injuria,* since CBS had a contractual right to cancel Poller's affiliation agreement and a legal right to choose to buy a rival station and to give that station (i.e., itself) the CBS affiliation. The majority of this court would affirm on the ground, as I understand it, that there was as a matter of law, on the record here, neither a conspiracy in restraint of trade nor a monopoly or attempted monopoly.

I disagree. In my view, Poller raises genuine issues of material fact as to whether there was a conspiracy against

him in restraint of trade and a monopoly. The charges he makes may, of course, appear ultimately to be without foundation in fact. But I think he is entitled to an opportunity to attempt to establish his charges before a jury, and that it was error to give summary judgment against him. Where the propriety of a summary judgment is involved, we are required, of course, to look at the case in the light most favorable to the plaintiff. *Calloway v. Hamilton National Bank*, 90 U. S. App. D. C. 228, 195 F. 2d 556 (1952).

1. Poller's allegation of conspiracy does not relate to the Columbia Broadcasting System (CBS) alone. It includes an unincorporated wholly-owned subsidiary, CBS-TV, two officers of CBS-TV, and other persons. It is clear that corporate officers can be members of a conspiracy with their corporation. The Supreme Court has so held. *Schine Theatres v. United States*, 334 U. S. 110, 116 (1948); *United States v. Yellow Cab Co.*, 332 U. S. 218, 227 (1947). The same cases establish that a corporation may violate the Sherman Act by conspiring with its wholly-owned subsidiaries. See also *United States v. Radio Corporation of America*, 358 U. S. 334 (1959); *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U. S. 211 (1951). In my view, CBS could conspire with CBS-TV, a wholly-owned, but not incorporated, "division" —as separate and distinct an organization as a wholly-owned subsidiary. Since there were other alleged co-conspirators, it is unnecessary, however, to rely on that ground. The outside persons, included as conspirators in plaintiff's charges, are not ruled out as possible conspirators merely because they are not presently defendants in this suit. A plaintiff is not required to sue and obtain judgment against every conspirator at his peril. Nor do I think that it is clear here, as do the majority, that these others were not conspirators. Whether or not they were is in issue, and the issue can only be resolved by proof.

2. In general, of course, a corporation may, without legal liability, deal with persons of its choice and exercise

the rights given it by its contracts. But clearly one of the qualifications to the free exercise of these rights is that they may not be used in a way which amounts to a conspiracy to restrain or to monopolize trade among the states. See *United States v. Parke, Davis & Co.*, 362 U. S. 29, 36-47 (1960).

Packard Motor Car Co. v. Webster Motor Car Co., 100 U. S. App. D. C. 161, 243 F. 2d 418, cert. denied, 355 U. S. 822 (1957), is not dispositive here. Upon loss of its franchise to sell Packard automobiles, the retail dealer involved could use its properties in a variety of ways, including the sale of other automobiles in competition with the Packard automobile. But a TV station operator can make only one use of his property, and, as will appear, without a network affiliation the property cannot be as profitably used, and the business may fail in consequence. Thus, the economic impact of CBS' action in cancelling Poller's network affiliation and buying the competing UHF station was highly damaging in a competitive sense. Furthermore, the Packard Company did not itself invade the retail market. Here CBS, primarily a wholesaler of programs, has entered the retail field.[1]

3. The essence of a violation of Section 1 of the Sherman Act is an unreasonable injury to, or restraint on, competition in a particular market in interstate commerce. Involved in this case are competitive interactions in three primary markets. First, there is the market in which television stations are bought and sold by station operators and entrepreneurs. Second, there is the local television broadcasting market in which viewers in particular areas accept or reject programs offered over local broadcasting stations.

1. For similar reasons, the other "refusal to deal" cases are equally inapplicable here. See, *e.g.*, United States v. Colgate & Co., 250 U. S. 300 (1919); Schwing Motor Co. v. Hudson Sales Corp., 138 F. Supp. 899 (D. Md.), *aff'd*, 239 F. 2d 176 (4th Cir. 1956), cert. denied, 355 U. S. 823 (1957). *Colgate* was of course severely limited in the Parke, Davis & Co. case, *supra*, if not sent "to its demise." See Mr. Justice Harlan dissenting, 362 U. S. at 49.

Although station profits do not come directly from payments by viewers, it can be fairly said that individual station operators compete for audiences which they are in effect able to sell to national and local advertisers. Third, there is competition among program producers for national advertisers. While local station owners may on occasion independently produce programs which merit the attention of advertisers seeking nationwide audiences, it is generally true that the three great television networks are the only competitors for advertisers seeking national program audiences. Poller says—and it seems reasonably clear on this record—that television stations in Milwaukee, especially UHF stations, cannot operate profitably without a network affiliation.

Through its operating division, CBS-TV, CBS is a primary producer of nationally broadcast television programs. While CBS owns several transmitting stations, CBS programs are generally presented to the viewing public over independently owned stations from which CBS obtains the right to use choice air time by means of affiliation agreements. At one time CBS-TV used the facilities of Poller's UHF station in Milwaukee under a network affiliation agreement. The present dispute arises because CBS-TV obtained an option to purchase the only competing UHF station in Milwaukee when it knew Poller's station was for sale, exercised its contract right to cancel Poller's network affiliation and then purchased Poller's equipment by giving him cash plus the poorer equipment of the Bartell station on which the option had been obtained. At the end CBS-TV had eliminated both Poller and Bartell from UHF telecasting in Milwaukee and it remained as the only telecaster in that field.[2] Competition in the entire market, comprising both UHF and VHF, was reduced.

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2. Whether or not CBS desired that result is a question of fact to be determined at a trial. In a case like the present, however, specific intent to restrain trade or monopolize may be unnecessary. See United States v. Griffith, 334 U. S. 100, 105 (1948).

The allegation that this was accomplished through a conspiracy has been denied and the question is in issue, subject to proof. It is further claimed by Poller that CBS was the only network willing to give relatively equal consideration to affiliation with UHF or VHF stations; that as a result, CBS had great effect on the entry or continued existence of UHF stations in the various local broadcast markets; and that by waiting for Poller and Bartell to develop the UHF market in Milwaukee and then using its economic and contractual power to establish itself in Milwaukee in their stead, CBS must have seriously discouraged new UHF operations elsewhere, for few entrepreneurs would be willing to pioneer a new field only to have the fruits of success taken from them by a network, without compensation. It is also claimed that the actions of CBS caused Poller's franchise to be reduced in value and his equipment to become useless and unmarketable elsewhere, and that CBS paid an unreasonably low price for his equipment.

In my view, the purchase and operation of the Bartell station as the exclusive CBS outlet in Milwaukee was an illegal restraint on competition if it forced Poller to go out of business under circumstances which discouraged or actually precluded the entry of new UHF stations into the Milwaukee TV market and other TV markets, thereby seriously retarding the development of the entire television industry.[3] Likewise, I think that the elimination of Poller in the way claimed could be deemed to be an elimination of competition by unfair means, an abuse which the antitrust laws were intended to preclude. *National Biscuit Co. v. Federal Trade Commission*, 299 Fed. 733, 738 (2d Cir. 1924); *United States v. Klearflax Linen Looms, Inc.*, 63 F. Supp. 32 (D. Minn. 1945). If Poller can prove these things to the satisfaction of a jury, I think he would be entitled to a verdict. He should be given that chance. On a motion for

3. Had CBS merely cancelled Poller's affiliation and given an affiliation contract to another independent Milwaukee station, it may be that no competitive evils would have resulted.

summary judgment the courts should be reluctant to deny the plaintiff his day in court when he alleges that he was forced out of business as a result of a conspiracy to eliminate him as a competitor. See *Slick Airways, Inc. v. American Airlines, Inc.*, 107 F. Supp. 199, 214 (D. N. J. 1951), app. dismissed, 204 F. 2d 230 (3d Cir. 1953), cert. denied, 346 U. S. 806 (1953). And this would seem particularly true where (as here) it is charged that the public has been deprived of maximum television service by a reduction of competition. See *Packaged Programs, Inc. v. Westinghouse Broadcasting Co.*, 255 F. 2d 708 (3d Cir. 1958).

My view is based in part upon *United States v. Radio Corporation of America*, 358 U. S. 334 (1959). There the United States asserted that RCA and its wholly-owned subsidiary NBC had threatened to cancel the NBC program affiliations of certain Westinghouse-owned stations, unless Westinghouse agreed to exchange its Philadelphia TV station for one owned by NBC in Cleveland, plus cash. The exchange was made and NBC was enabled to enter a new market area. The District Court granted summary judgment for RCA on the theory that the United States was precluded from bringing an antitrust action because the Federal Communications Commission had approved the challenged transaction. 158 F. Supp. 333 (E. D. Pa. 1958). The Supreme Court repudiated this theory, and reinstated the complaint. Although the Supreme Court did not expressly characterize as illegal the actions of RCA, its reversal of the District Court would appear to mean that the complaint adequately stated a cause of action. If the plaintiff's allegations are proved, the present case differs only in that CBS did not openly threaten Poller. If the actions of CBS had in fact had an irresistibly coercive effect on Poller, the absence of an overt threat would not be significant, and Poller's claim seems to be even stronger than that of Westinghouse, since here, unlike its case, the result of the CBS transaction was to reduce TV competition in the particular market area involved.

4. Similarly, Poller would be entitled to recover under Section 2 of the Sherman Act if he can prove, as he claims, that CBS had power to exclude him and other competitors in Milwaukee, and intended to use that power. See *United States v. Griffith*, 334 U. S. 100 at 107 (1948). "It is the exclusion of others from the opportunity of doing business that is regarded as monopolizing." *National Biscuit Co. v. Federal Trade Commission, supra* at 738.

The present record suggests that it may appear, if proof were offered, that once CBS had purchased Bartell's station, it had absolute power to exclude other independent UHF operators from Milwaukee so long as the other networks did not alter their attitudes toward UHF. Certainly, there are substantial indications that CBS had monopoly power over UHF in Milwaukee at the time it cancelled Poller's affiliation. Although CBS' station was in competition with Milwaukee VHF stations for viewers and thus not a monopolist in the viewer market, it may well be that CBS' economic strength gave it virtual monopoly power over the entry of new stations into Milwaukee. The possibility of new VHF entrants into Milwaukee may have been closed for practical purposes (apparently the third and last VHF channel in Milwaukee went into operation shortly after CBS entered Milwaukee). And by lowering local advertising rates or being able to do so, CBS may have been able effectively to preclude the entry into Milwaukee of new UHF independents who were simultaneously faced with the reluctance of other networks to affiliate with them. Proof of such facts would, I think, support a verdict in Poller's favor.

In reaching my conclusions as to both Sections 1 and 2, I have not failed to note that with respect to each of the claimed violations CBS made factual allegations which if proved might warrant a judgment in its favor, and that proof of Poller's claims will not be easy. But I think that he is entitled to go to trial.

JUDGMENT.

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF It is ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and it is hereby, affirmed.

It is further ORDERED by the Court that appellees herein recover from appellant their taxable costs on this appeal, and have execution therefor.

Per Chief Judge Wilbur K. Miller.

Dated: Nov. 10, 1960

Separate dissenting opinion by Circuit Judge Washington.

APPENDIX B.

STATUTES INVOLVED.

Sherman Act.

"1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

"2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . .

"7. The word 'person', or 'persons', wherever used in Sections 1-7 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

Clayton Act.

"4. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."